REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 75 of 2004

KIRERU MURIUNGI …….…….. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the conviction and sentence of A.N. Kimani, S.R.M. in Marimanti Cr. Case No. 329 of 2003)

J U D G M E N T

The appellant, Kireru Muriungi, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was convicted and sentenced to suffer death as by the law provided. His appeal is against the conviction and sentence. The prosecution facts were that the complainant Damiano who gave evidence as PWI, found the appellant walking on the way in the village of Thangatha on 3.6.2003.

Appellant who was in company of another, held the complainant whom they threw to the ground as they started to beat him. As the complainant screamed for help the two forcefully stole from his pocket Kshs. 3,000/=, ID card and his radio permit. He had known the two attackers well before the incident. Three other men came to the complainant's rescue. He was injured on the head and neck, by clubs which the appellant and his colleague used to beat him with. He was taken to Administrative Police Officers who took him to hospital at Marimanti where a P3 was filled and where he surrendered his blood stained shirt to the police for tests. The attack apparently took place at night and the complainant stated that he used moonlight to identify the attackers. He also heard them talk as they beat him which enabled him to identify their voices.

The evidence of PW2, Stephen Kigera Ogweta was that when he heard screams, on the evening of 3.6.2003, he came out of his house and saw the complainant who was bleeding. The complainant mentioned the appellant's name. PW2 took the complainant to the A.P.'s camp after noticing injuries on the head and neck of the complainant.

On the same evening PW3, Cyrus Kirimi who lives in the same locality with the complainant and PW2, heard screams and came out of his house. When he went to the spot where screams came from, he met the complainant who was bleeding from the head and neck. Complainant stated to them that he knew the assailants, after which they escorted him to the A.P.'s camp.

With only the above evidence of the three witnesses the prosecution sought and obtained leave to produce the complainant's P3 under section 77 of the Evidence Act. The prosecution then closed their case. No

explanation was sought nor given as to why the investigating officer, the doctor who filled the P3, and the police officers who received the first report were not called to testify.

The appellant in his defence simply stated that on 23.5.2003, the police arrested him after telling him that he had stolen.

In his short judgment, the honourable trial magistrate considered the above evidence. He accepted that the complainant knew the appellant before the incident and that he identified him in the moonlight during the robbery. He saw no motive on the complainant's part to frame the appellant. He believed that the complainant had ample time to recognize the appellant. He saw the appellant's defence as a mere denial which failed to dent the complainant's evidence. He appreciated the fact that the evidence of identification was that of a single witness but was satisfied that it proved the charge beyond a reasonable doubt. He then proceeded to convict.

We have carefully considered the evidence and circumstances of this case. We observe that the complainant was attacked by two people at night. Neither the trial magistrate nor the prosecutor investigated the conditions under which the attack took place. It is not clear therefore whether the moonlight was bright or moderate or dim. If it was dim, which was not ruled out, recognition of the attackers by the complainant was likely to be uncertain and/or unreliable. As this factor of uncertainty or unreliability cannot be ruled out and since there is no other evidence on record which could link the appellant to the attack, the reasonable doubt created shall be (and should have been) treated in favour and to the benefit of the accused.

In addition and without prejudice to the conclusion we have reached above we notice other very important issues which would, in any case, have negatively affected the conviction in this case. There was very poor investigation of this case by the police. The early reports made to the police were important to establish the veracity of the complainant's claim that he recognized the attackers and at earliest, gave their names to the police. There is no reason for example why one Gitonga Kanyaru who was reported as being the other attacker in company of the appellant, was not arrested and charged jointly with the appellant if his name was given with that of the appellant. That complainant may not have given the names to the police at the earliest moment of his report becomes likelihood.

Further more the introduction of the complainant's P3 in evidence purportedly under section 77 of the Evidence Act does not sound right. No ground was laid or cleared to show that it was right and proper to produce the document. In our view section 77 aforesaid is supposed to be read together with section 33 of the Act. It therefore would have been appropriate in relation to this case, for the court to have allowed the production of the P3 only if the conditions specified under section 33(b) of the Act were fulfilled, And even under those circumstances, the P3, would be produced by a professionally qualified person who would be able to respond as well to basic questions arising in relation to the identity of the maker. The relevant procedure was not observed here and it cannot be easily argued that what happened did not prejudice the appellant. And finally, we also note that the honourable trial magistrate made some important conclusions which were not supported by evidence. For example the magistrate concluded that the complainant had ample time with the attackers to enable him to recognize them. There is no evidence on record to support such crucial conclusion which was liable to prejudice the appellant.

For the above reasons, we have come to the conclusion that there was no relevant adequate evidence upon which the appellant would be convicted. The trial court ought to have given him the benefit of various doubts pointed out herein above. We now exercise such an obligation.

Having come to the above conclusion we find that this appeal has merit and should be allowed. The conviction on the robbery with violence charge is quashed. The sentence of death is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully detained.

It is so ordered

Dated and delivered at Meru this 27th day of September, 2005

D.A. ONYANCHA

JUDGE

27.9.2005

RUTH N. SITATI

JUDGE

27.9.2005